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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, AND BRIEF IN SUPPORT.

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PETITION BY CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES, FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF CLAIMS ENTERED JUNE 5, 1950, DISMISSING A PETITION FOR A MONEY JUDGMENT AGAINST THE UNITED STATES.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Summary of the Matter Involved

The petitioner owns and operates a wholesale and retail dairy business in Lexington, Kentucky. During the period May 15, 1946 through June 30, 1947 he furnished dairy products to the Veterans Administration hospital in that

city under a contract awarded him May 13, 1946. Such contract contained the standard form paragraph:

> "6. Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Prior to being awarded the contract, petitioner was advised by the supply officer of the hospital that the above paragraph would permit a successful bidder to increase and adjust the contract price if the Office of Price Administration (hereinafter referred to as O.P.A.), a federal agency, increased price ceilings on the dairy products to be furnished under the contract. The Chairman of the Board of Awards also advised petitioner that he was of opinion that prices could be so adjusted under the quoted paragraph.

The petitioner performed the contract. Less than a month after he began deliveries, on June 7, 1946, the O.P.A. increased the price ceilings on dairy products for the Lexington, Kentucky area. (O.P.A. supplemental order 164, Fed. Reg. June 11, 1946, p. 6301.) Petitioner's costs of performance were thereby increased. He billed the hospital for those increased costs and received payment. Thereafter the same were deducted from the last monthly payment under the contract.

Plaintiff brought the instant action in the Court of Claims to recover the conceded amount of such increased costs, That Court dismissed the action on the ground that the questioned paragraph did not relate to an adjustment in ceiling prices by the O.P.A. and that petitioner was not entitled to rely upon the expressed opinion to the contrary of the Chairman of the Board of Awards.

A dissenting opinion was filed with which the Chief Judge agreed.

Jurisdictional Statement

Jurisdiction of this Court is based on section 1255 (1) of Title 28, United States Code.

Statute Involved

The only statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, chapter 26 (50 U. S. C. App. sec. 901 et seq.). The Office of Price Administration issued, pursuant to the authority of that statute, its supplemental order 164, dated June 7, 1946 which is set forth in the Federal Register of June 11, 1946 at page 6301.

Questions Presented

Was supplemental order 164 of the Office of Price Administration (issued pursuant to laws of the United States and increasing the price of dairy products for the Lexington, Kentucky, area) the action of Congress and thereby a definite, fixed and directly applicable charge within the meaning of paragraph 6 of petitioner's contract?

Was petitioner entitled to rely upon assurances, given him prior to award of the contract, by the government supply officer and Chairman of the Board of Awards that paragraph 6 did relate to adjustment by the Office of Price Administration in ceiling prices for such dairy products?

Reasons for Allowance of the Writ

1. The meaning and scope of paragraph 6 in government contracts should be settled definitely to the end that lay bidders in particular may understand it.

2. The extent of the Government's liability under standard form contracts containing this paragraph and likewise the extent to which reliance under the instant facts may be had upon assurances of government officers in the award of contracts, should be determined and settled. The observation of the dissenting judge below (R. 15) is compelling:

> "If that is the law, another uncertainty is added to the status of a contractor with the Government, for which added uncertainty the Government will, of course, pay dearly in the long run in the additions which bidders must make to otherwise fair prices as insurance against unanticipated interpretations of their contracts."

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF PETITIONER IN SUPPORT OF PETITION

Opinion Below

The majority and dissenting opinions of the Court of Claims (R. 7-13, 13-16) are not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered June 5, 1950. The jurisdiction of this Court is invoked under Section 1255 (1) of Title 28, United States Code.

Questions Presented

1. Was the order of the Office of Price Administration (issued June 7, 1946, increasing the price of dairy products in the Lexington, Kentucky, area) the action of Congress and thereby a definite, fixed and directly applicable charge "upon the production, manufacture, or sale of the supplies" within the meaning of paragraph 6 of petitioner's contract?

2. Was petitioner entitled to rely upon assurances, given him prior to award of the contract, by the government supply officer and Chairman of the Board of Awards that paragraph 6 did relate to adjustment by the Office of Price Administration in ceiling prices for such dairy products?

Pertinent Statute

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, Chapter 26 (50 U. S. C. App. sec. 901 et seq.), authorized the stabilization of prices of agricultural commodities and the establishment of maximum prices therefor by regulation or order of the Office of Price Administration. By supplemental order 164, dated June 7, 1946 (Federal Register, June 11, 1946, page 6301) the Office of Price Administration increased the price ceilings on the dairy products covered by petitioner's contract. The text of the Act and of the supplemental order are not deemed necessary to be set forth herein as the authority under the Act and the order are not in dispute (R. 5, 6; Findings 2, 4).

Statement

The essential facts are stated briefly in the Summary of the Matter involved accompanying the petition for the writ. The Court below made detailed special findings of fact (R. 4-7).

Argument

We believe the answers to each of the two questions presented should be in the affirmative. The incisive views in the dissenting opinion seem to us correct and to establish that the majority opinion below is erroneous:

> "Paragraph 6 is not a statute. It is, in any particular case such as this, merely the language which parties have used in making a contract. If it has a plain meaning to some one 'in Washington', it obviously did not have that plain meaning to this plaintiff dairyman in Kentucky, because he inquired what it meant. And it meant plainly to the Government Agent who had been stationed in Kentucky to, *inter alia,* make contracts for the Government, the very opposite of what it was later said to mean 'in Washington'. All of this seems to me to show that it was at least ambiguous enough to mean what the parties agreed that it meant, viz., that if prices were increased by the O.P.A. and the plaintiff paid those increases, its bid prices to the Government would be increased accordingly" (R. 14).

The Comptroller General asserted in his denial of petitioner's claim that a price increase is neither a tax nor a charge (R. 7, Finding 6). But it definitely is an "adjustment charge" or "charge". It stems from, and the basis of the cited O.P.A. order is, the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. sec. 901 et seq.)

Paragraph 6 as used in earlier government contracts related solely to sales tax duties, imposts, revenues, excise or other *taxes.* See, *Batavia Mills, Inc.,* v. *U. S.,* 85 Ct. Cls. 447; and *Righter* v. *U. S.,* 85 Ct. Cls. 699. Subsequently the provision was changed by enlarging it to include adjustment charges or other taxes or charges. The Court of Claims construed the identical paragraph in *Telescope Folding Furniture Co.* v. *U. S.,* 90 Ct. Cls. 635, *Consoli-*

dated Aircraft Corp. v. *U. S.*, 90 Ct. Cls. 496, and in *Clemmer Cons. Co.* v. *U. S.*, 108 Ct. Cls. 718. In the latter case (p. 723), that Court stated that the provision applies only "to definite, fixed, and directly applicable legal charges" aside from the question of whether additional charges were imposed by action of Congress.

Certainly the O.P.A. increases on June 7, 1946 became definite, fixed and directly applicable charges. Furthermore the petitioner and the Chairman of the Board of Awards were in complete accord as to the meaning of the provision at the time the contract was entered into. (*Consolidated Aircraft Corp.* v. *U. S.*, 90 Ct. Cls. 496, 499.)

In the absence of the action by the O.P.A., manifestly petitioner would not have been compelled to pay the increased costs of performing his contract. There is no analogy between those costs which were directly applicable upon the production, manufacture or sale of the dairy products, and the *imposition of Social Security taxes on payrolls* as was the situation in the *Consolidated Aircraft Corporation* case.

The charges paid by petitioner were occasioned by authority of Congress subsequent to the contract date, were not taken into consideration by him when his bid was submitted. "It was this increased cost, brought about by the defendant's act, which the parties intended to take care of." (*Telescope Folding Furniture Co.* v. *U. S.*, 90 Ct. Cls. 635, at page 643.)

We shall not attempt to improve upon the following expressions contained in the dissenting opinion below (R. 15):

> "The Court's conclusion is based upon the proposition that the Chairman of the Board of Awards was not shown to have given authority to alter the language of paragraph 6. He did not, of course, alter or purport to alter it. He only stated what it meant. Some one was required to say what the Government

meant by language which it used which did not have a plain meaning. If the Government man with the imposing title, Chairman of the Board of Awards, did not even have authority to tell a milkman what certain words in a contract which he was sitting to award meant, he constituted a trap for the plaintiff and caught him. If his role was to say nothing, because he didn't know enough to talk, he should have been told to keep quiet and not entrap innocent citizens."

Conclusion

The petition for the writ should be allowed. The judgment should be reversed with directions to enter judgment for petitioner.

Respectfully submitted,

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